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Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1019

# In the
# Supreme Court of the United States

OCTOBER TERM, 1988

HERBERT D. BERKSON,
PETITIONER,

*v.*

DEL MONTE CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## Brief In Opposition of the Respondent, Goodwin, Procter & Hoar

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## Question Presented for Review.

Whether the courts below were correct in unanimously deciding on the facts that the petitioner's claims against Goodwin, Procter & Hoar were time-barred.

## Parties.

The parties to this action are: (1) Herbert D. Berkson ("Berkson" or "petitioner"), the petitioner in this Court, the plaintiff in the District Court, and the appellant in the United States Court of Appeals for the First Circuit; and (2) Goodwin, Procter & Hoar ("Goodwin Procter"), a respondent in this Court, a defendant in the District Court, and an appellee in the First Circuit.

There are nine additional respondents in this action, all of whom were also defendants in the District Court and appellees in the First Circuit: (1) Covington & Burling; (2) Nathaniel Davis; (3) Del Monte Corporation ("Del Monte"); (4) Henry A. Kissinger; (5) Palmer & Dodge; (6) Pillsbury, Madison & Sutro; (7) Price Waterhouse; (8) United Brands Company ("United Brands"); and (9) William A. Rogers.

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### Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, *Herbert D. Berkson* v. *Del Monte Corporation*,

*et al.*, No. 87-1539, dated June 29, 1988, is not published. It is reprinted in the Petitioner's Appendix (Pet. App. at 1a).[1]

The Order of the United States District Court for the District of Massachusetts accepting and adopting the Magistrate's Report and Recommendation on Defendants' Motions to Dismiss or, In the Alternative, Motions For Summary Judgment (the "Magistrate's Report"), and thereby entering judgment for Goodwin Procter, was dated May 29, 1987 (Pet. App. at 1k).

The Magistrate's Report which was accepted and adopted by the District Court was dated April 23, 1987 (Resp. App. at 1a).

## Statement of the Case.

Respondent Goodwin Procter incorporates by reference the Statement of the Case contained in the Brief and Appendix In Opposition of the Respondent, United Brands Company, filed contemporaneously herewith. Respondent Goodwin Procter supplements the referenced Statement of the Case as follows:

Goodwin Procter is a Boston law firm established in 1912. Goodwin Procter has represented United Brands Company in the three lawsuits which petitioner has commenced against United Brands since 1974. Goodwin Procter did not, however, have any involvement in the transactions and occurrences which gave rise to petitioner's three lawsuits. Goodwin Procter did not, for instance, represent United Fruit, now known as United Brands, in connection with either the 1958 Consent Decree or the 1972 divestiture sale of United Fruit's Guatemala banana lands to Del Monte.

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[1] Citations to Petitioner's Appendix are in the form "(Pet. App. at ___)." Citations to Respondent United Brands' Appendix, which is printed and bound with the Brief In Opposition of Respondent, United Brands Company, are in the form "(Resp. App. at ___)."

During petitioner's state court action (hereinafter "*Berkson I*") against United Brands as well as petitioner's previous federal court action (hereinafter "*Berkson II*"), Goodwin Procter served as counsel for United Brands. It is only in this most recent case that petitioner has named Goodwin Procter as a defendant. Petitioner has also in this case named as a defendant Palmer & Dodge, the law firm which represented Del Monte in *Berkson II*.[2] Petitioner's only claims against Goodwin Procter concern allegations of misconduct in connection with the defense of United Brands in *Berkson II*.

In the current case, petitioner brought claims against Goodwin Procter under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*[3] The courts below dismissed petitioner's claims against Goodwin Procter under the statute of limitations.

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[2] In the current action, petitioner has also named as defendants the law firms — Covington & Burling and Pillsbury, Madison & Sutro — which respectively represented United Fruit and Del Monte during the transactions and negotiations leading up to the 1972 divestiture sale. In addition, petitioner's current suit is against the accounting firm of Price Waterhouse and three former high ranking government officials — Nathaniel Davis, Henry A. Kissinger and William Rogers.

[3] Petitioner also raises for the first time in the current Petition arguments under the Anti-Deficiency Act, 31 U.S.C. §§ 1341 *et seq*. These arguments are meritless. In further response to petitioner's irrelevant Anti-Deficiency Act contentions, Goodwin Procter incorporates herein by reference the arguments contained in the Brief and Appendix of the Respondent, United Brands Company and in the Brief of Respondent Covington & Burling in Opposition to Petition for Writ of Certiorari.

## Reasons for Denying the Writ.

### I. The Courts Below Correctly Held That Berkson's RICO Claims Against Goodwin, Procter & Hoar Were Time-Barred.

The statute of limitations for civil RICO actions is four years. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987).[4] Petitioner commenced this action on September 25, 1986. Therefore, unless petitioner's RICO claims accrued after September 25, 1982, they are time-barred.

The courts below found that petitioner knew or should have known of his alleged RICO injury arising out of *Berkson II* well *before* September 25, 1982. The Court of Appeals noted petitioner's assertion that by November 25, 1981, "he noticed that the district judge in the prior federal action [*Berkson II*] had turned against him as part of a conspiracy involving Palmer and Dodge, Goodwin, Procter, and Hoar, and their clients," (Pet. App. at 1f). The First Circuit held that petitioner's RICO claims against Palmer & Dodge and Goodwin, Procter & Hoar accrued no later than this November 25, 1981 date; and were, thus, time-barred when petitioner commenced this action on September 25, 1986.

Petitioner has not shown that any defendant committed a single specific act after September 25, 1982, which could

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[4] This Court's decision in *Agency Holding Corp.* was handed down after the District Court entered judgment against petitioner but before the First Circuit decided petitioner's appeal. The District Court, following the Magistrate's Report and Recommendation (*see* Resp. App. at 1a), had applied a three year limitations period to petitioner's RICO claims. The First Circuit examined the record facts in light of the four-year period mandated by *Agency Holding Corp.* and specifically found that the additional year made no difference. It held that petitioner's "claims under RICO . . . are . . . time-barred even under *Agency Holding Corp.*" (Pet. App. at 1f.)

conceivably qualify as a predicate for civil RICO liability.[5] Nowhere in his Complaint, nor in his opposition to defendants' summary judgment submissions before the District Court, nor in his briefs to the First Circuit, nor in his current Petition for Certiorari has Berkson identified, let alone shown by admissible evidence, the existence of a RICO predicate act performed by Goodwin Procter or any other defendant after September 25, 1982.

No matter how the starting point for the civil RICO limitations period is measured — whether from the date of defendant's first alleged RICO predicate act or the date of plaintiff's alleged knowledge of defendant's last alleged RICO predicate act — petitioner's RICO claims against Goodwin Procter are time-barred. When Goodwin Procter and the other respondents moved for summary judgment before the District Court, the burden plainly became petitioner's to "designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Petitioner wholly failed to meet this burden. He has simply failed to show that there is a genuine issue as to the existence of any material fact that would support the proposition that his alleged RICO claims accrued after September 25, 1982. Accordingly, the First Circuit was correct to hold that petitioner's RICO claims based on events in his prior federal action are time-barred.

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[5] The current Petition refers to a May 1983 document production made during *Berkson II* by Palmer & Dodge on behalf of Del Monte. Petitioner merely asserts that the document production provided him with proof of his previous suspicions. Petitioner does not maintain that prior to May 1983 he was ignorant of his alleged injury or that he was unaware of the various defendants' having allegedly caused his injury. Under such circumstances, it is not the rule that a statute of limitations is tolled until such time as a plaintiff's suspicions ripen during discovery. *See generally United States* v. *Kubrick*, 444 U.S. 111, 122-125 (1979). *See also United States* v. *Mottaz*, 476 U.S. 834, 843-844 (1986); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971). In any event, the May 1983 document production is irrelevant to petitioner's claims against Goodwin Procter.

Notwithstanding his complete inability to designate a single post-September 25, 1982 RICO predicate act, in his current Petition Berkson has pointed to this Court's 1985 decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), as a reason why his RICO claims should not have been time-barred. Petitioner argues that the RICO limitations period should not have started running until this Court's 1985 decision in *Sedima*, because until then he could not have been certain of his rights under RICO. However, even though *Sedima* may have clarified the parameters of civil RICO, the decision is not relevant to when the statute of limitations began to run. *See, e.g., Kubrick*, 444 U.S. at 122-125; *Jensen* v. *Snellings*, 841 F.2d 600, 606 (5th Cir. 1988) ("The requisite knowledge that a plaintiff must have to begin the running of the limitations period 'is merely that of the *facts* forming the *basis* of his cause of action,' . . . not that of the existence of the cause of action itself") (emphasis in original) (citations omitted).

Petitioner also suggests that the continuing adverse effects which he allegedly experiences from the 1972 divestiture sale somehow give rise to actionable claims under RICO. This suggestion is obviously irrelevant to petitioner's claims against Goodwin Procter, which was not in any way involved in the 1972 transaction. Moreover, even as against the other defendants, the suggestion is without a scintilla of precedential support. The continuing harm allegedly experienced by Berkson "must be seen as the 'unabated inertial consequence[ ]' of the earlier events," *Berkson* v. *Del Monte Corp.*, 743 F.2d 53, 55 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985) (citation omitted), and not as the basis for a claim under RICO.

## II. This Court Should Not Engage in Further Fact Finding Concerning the Timeliness of Petitioner's Claims.

As indicated above, petitioner has plainly failed to meet his burden of designating a single specific act occurring after September 25, 1982 which could serve as a predicate for civil RICO liability. *Celotex*, 477 U.S. at 324. The two courts below carefully combed the voluminous record and concluded without equivocation that all of Berkson's claims against Goodwin, Procter & Hoar were time-barred under applicable statutes of limitations. The Court of Appeals specifically found that Berkson's civil RICO claims were barred under the four-year limitation period established by *Agency Holding Corp.* There is no need for this Court to engage in any further fact-finding. As this Court has stated, "we do not grant certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

## Conclusion.

For all of the reasons set forth above, as well as for the reasons set forth in the Brief In Opposition filed by respondent United Brands Company, Berkson's Petition for Certiorari should be denied.

Respectfully submitted,

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DATED: February 6, 1989